United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 76-4011

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL UNION NO. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

B
P/S

BRIEF FOR RESPONDENT,
Local Union No. 584, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America

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BRIEF FOR RESPONDENT, Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

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STATEMENT OF THE ISSUE

Whether the Board, by failing to follow its established 10(k) precedents and by arbitrarily weighing relevant factors in reaching its conclusion, has erred in awarding the work in dispute to employees represented by the Machinists' Union Local 447 rather than to employees represented by the respondent Teamsters' Union, Local 584.

PRELIMINARY STATEMENT

This case is before the Court on the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), for enforcement of its order issued on October 28, 1975, against Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "Local 584"). The Board's Decision and Order in the unfair labor practice proceeding are reported at 221 NLRB No. 18 (A.2-10).[1] The Board's Decision and Determination of the underlying jurisdictional dispute made pursuant to Section 10(k) of the Act is reported at 212 NLRB No. 71 (A. 11-19). It is undisputed that this Court has jurisdiction under Section 10(e) of the Act.

It is the position of Respondent, Local 584, that the Board's work award in the underlying §10(k) proceeding (212 NLRB No. 71) is not sustainable and may not be used as the foundation for its conclusion that Local 584 has violated §8(b)(4)(ii)(D) (221 NLRB No. 88).

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1. "A" references are to pages of the joint appendix.

As will be shown more fully below, the Board's conclusion that the disputed work should be taken away from the employees represented by Local 584, who for over fourteen years have continuously and satisfactorily performed the work pursuant to its contract and as assigned by its Employer, and awarded to employees represented by Local Union 447, District 15, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter, "Local 447"), is not supported by substantial evidence on the whole record.

Further, it is Respondent's position that the Board has failed to give proper weight to the relevant factors in this case under its own 10(k) precedents; therefore its conclusion is unprincipled and arbitrary.

Thus, for purposes of obtaining review of the Board's award, Local 584 denies that it committed any unfair labor practices and urges this Court to deny enforcement of the Board's order as sought in the instant action. Rather, Local 584 urges this Court to enter a judgment vacating or setting aside the Order of the Board, thereby preserving the jurisdiction of Local 584 over the work in dispute, and permitting the employees represented by Local 584, who have performed this precise work continuously for fourteen years, pursuant to the Employer's assignment, to continue to do so.

COUNTER-STATEMENT OF THE CASE

Background of the Work Dispute.

Prior to 1960, the truck mechanics employed in the garage at the Holland Farms Milk plant complex at Maspeth, Queens, New York, were employed by Holland Farms directly and were represented by Local 584 (A. 86; T.108)*.

In 1960, Holland Farms entered into an arrangement with the Hertz Corp. whereby the truck fleet utilized by Holland would thereafter be owned and maintained by Hertz. The Holland Farms mechanics were transferred to the Hertz payroll, Hertz recognized and became bound by the Local 584 contract, and the mechanics retained all seniority and pension rights accrued during their Holland Farms employment (A. 87; T.108).

From 1960 to the present Hertz and Local 584 have been parties to a series of collective bargaining agreements which provide, in pertinent part:

> "This Agreement shall cover every employee of the Employer employed in or about a milk distributing branch, pasteurizing plant, and garage in the Metropolitan area...

*"T" as used throughout this brief refers to the Transcript of the hearing held on April 3 and 10, 1974 before the Hearing Officer upon which the Board based its 10(k) determination.

> If any Employer should move its plant to any location within the Metropolitan area, or should move its depot or other facility to any other location within the Metropolitan area ... this contract shall remain applicable and cover the employees at the new location". *
> (A, 114-115) (emphasis added)

Local 584 currently represents all the mechanics employed by Hertz in and about the other milk plants that have accounts with Hertz. Thus, Local 584 represents Hertz employees at the Queensborough Farms location, the Dairylea account on Long Island and other employees servicing milk accounts in and around the Queens area, in addition to the mechanics at the Maspeth facility (A. 31, 32, 32-A; T.16-18).

Joseph Barone, Business Representative for Local 584 since mid-1961, testified that six or seven months after the Hertz-Holland transaction and Hertz assumption of the Local 584 collective bargaining agreement Hertz expanded its operation at the Holland Farms garage to include maintenance upon trucks leased by Hertz to companies other than Holland -- so-called "non-milk trucks". Hertz assigned the work to members of Local 584. (A. 87; T.108). **

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* The agreement specifically covers all mechanics and mechanics helpers while it exempts certain categories of employees (not germaine herein). It does not specifically limit the work to be done at milk plant locations to milk trucks (A. 114; A90).

** Philip G. Marsh, the former Hertz officer who testified to events surrounding the negotiations leading to the Hertz takeover of the Local 584-Holland contract in 1959-1960, testified that he left the employ of Hertz in May or June of 1961 and had no knowledge of what transpired with regard to the work performed at the Holland location after May or June 1961. (A. 102; T.139).

Hertz also leased a small piece of property located directly across the street approximately 50-75 feet from the Holland garage (A. 34; T.22). This piece of property, containing a Quonset hut, was used as an adjunct to the main milk plant garage. As the truck fleet serviced by Hertz increased, Local 584 mechanics performed repair work there regularly; when the truck fleet diminished, the location was used for minor repairs and storage (A. 88-89, T.110-112).

Since 1961, the single unit of Local 584 mechanics has worked on milk and non-milk trucks interchangeably at both these locations (A. 88; T.111) under the supervision of one garage supervisor (A. 36; T.24).

Hertz' assignment to 584 continued uneventfully for over ten years, despite fluctuations in the number of milk and non-milk trucks serviced at the Maspeth facility. Testimony adduced that in 1963-1964 there were about 200 milk trucks and 100-150 non-milk trucks serviced by Local 584 mechanics but that subsequently the number of non-milk trucks declined, so that today there are about 35 non-milk trucks and 160 milk trucks serviced at the Maspeth facility (A. 88; T.110-111).

It is not disputed that at all times the work performed by Local 584 members was satisfactory to Hertz (A.17). At the 10(k) hearing, Roger Keehn, a Hertz witness, testified that as

late as 1972 he was advised that "... if Hertz Corporation had to choose, the work should go to 584" * (A. 42, T.35).

In 1972, notwithstanding this continuous representation by Local 584 of the mechanics employed by Hertz at the Holland milk account garage and its across-the-street annex, Local 447 of the International Association of Machinists began claiming that the work performed upon non-milk trucks should be within its jurisdiction (A. 36; T.25).

Local 447 has represented Hertz mechanics at locations other than milk account locations since 1955 ** (A. 4, 49,95). At all times material this action Local 447 has been fully aware that Hertz has had a succession of collective bargaining agreements with Local 584 covering mechanics working "in and about" milk account locations since the 1960 agreement between Hertz and Holland. (A. 96,98). Local 447 had never represented mechanics at any Hertz garages located at milk plants (A.32-A). There has never been any agreement, either between Hertz amd Local 584 or between Locals 447 and 584, limiting the 584 work

*The Board attempts to discredit this statement as "merely passing advice from counsel no longer employed"(NLRB Brief, p. 11, n. 7). However, Keehn testified that the advice was from Hertz' in-house counsel, "... your predecessor, Mr. Obel, who is no longer with Hertz Corporation..."(A 42); thus, the position stated was that of the Hertz Corporation itself.

**Local 447 also had a collective bargaining agreement with Hertz' predecessors, Metropolitan Distributors, Inc. (A 68; T.76).

to milk trucks only (A 90; T.113). However, as the Hertz leasing and rental business began to decline over the past few years, requiring a retrenchment of non-milk facilities and layoffs of Local 447 mechanics, Local 447 became concerned about its loss of members due primarily to the company's loss of the non-milk business (A. 36; T.25-27). Therefore, 12 years after Local 584 began representing Hertz mechanics at milk account locations, Local 447 first asserted its claim to the non-milk work at the Holland milk facility. Local 447's claim intensified in 1973 when it learned that Holland-Hegeman was renegotiating its lease with Hertz and that one of the conditions Holland imposed on Hertz was that the few non-milk trucks left be separated out of the Holland garage and serviced on the adjacent lot prior to delivery of 54 new milk trucks (A 41; T.33)*. Hertz continued to assign the work to 584 despite Local 447's claim and announced plans that it had determined to continue assigning both the milk and non-milk work to Local 584 at this location during its lease renewal negotiations with Holland-Hegeman in 1973 (A 61,62; T.64-65). It was only in the face of Local 447's

* The actual physical separation had not occurred as of the date of the hearing, despite the new Hertz-Holland agreement, since only six new milk trucks had been delivered (A.42; T.34).

persistent demands and Local 584's desire to continue performing the work it had been doing that Hertz determined that it could not satisfactorily resolve the dispute without th procedures available to it under Section 10(k) of the Act.

The Board's 10(k) Work Dispute Award.

1. The Section 10(k) proceeding. Unable to resolve this dilemma, on January 16, 1974, Hertz filed charges against both unions, alleging violation of Section 8(b)(4)(ii)(D) of the Act.

Pursuant to Section 10(k), hearings were held on April 3 and 10, 1974. The Employer, Local 447 and Local 584 appeared and gave testimony. The Board issued its determination after reviewing the record and the briefs submitted by the unions. To the extent that Hertz took any position at the hearing as to which union should be assigned the work, Hertz said "the Board should make a determination based on 10(k) standards, under 10(k) standards, and avoid any compromise or splitting which would cause us operational disaster, and could well result in the closing of part of the facility" (A. 104; T.143). It was clear that by the time Hertz asked the Board to resolve the jurisdictional issues it deemed itself "caught in the middle" by the unions' competing claims. (A.103; T.141).

2. The Board's Findings and Conclusions. The Board found that Local 447 was entitled to the work in dispute, i.e. the maintenance and repair on non-milk trucks leased by the employer which are serviced and repaired at its facilities located at 5657 58th Street and 5624 58th Street, Maspeth, Queens, New York. In awarding the work to Local 447, the Board found the following facts:

a) that neither Union had been certified by the Board to perform the work in dispute;

b) that both collective bargaining agreements contain language which could cover the work in dispute but that "at least as disclosed by the record" the Local 447 contract "more precisely covers the work";

c) that the Employer's past practice for at least 16 years has been to utilize "to the extent practicable, the services of employees represented by Local 447 with the exception of this one dispute" (A.17);

d) that the factors of skill necessary to perform the disputed work and of the efficiency required for the operation of the employer's business favored neither union. (A.17).

Asserting that it had considered "all pertinent factors herein", the Board summarily concluded:

> "This award is consistent with the Employer's contractual obligations and its overall past practices. In addition, the Employer is satisfied with the performance of its employees, who possess the requisite skills for the type of work involved herein". (A. 17)

The Board's Unfair Labor Practice Order.

Local 584 declined to comply with the Board's determination, and, for purposes of obtaining a final Board disposition of the issue, admitted having violated Section 8(b)(4)(ii)(D) of the Act. Accordingly, the Board found and concluded that Local 584 had violated the Act by failing to comply with the Board's 10(k) Decision and Determination of Dispute (A. 8).

ARGUMENT

THE BOARD HAS FAILED TO APPLY ITS OWN 10(k) STANDARDS TO THE FACTS OF THIS CASE AND HAS ERRED IN AWARDING THE WORK IN DISPUTE TO EMPLOYEES REPRESENTED BY THE MACHINISTS LOCAL 447 RATHER THAN TO EMPLOYEES REPRESENTED BY TEAMSTERS LOCAL 584

The question before this Court is whether the Board's Determination of the 10(k)* work dispute is supported by substantial evidence on the record and whether the Board arbitrarily weighed the relevant factors in reaching its conclusions by failing to follow its established 10(k) standards. If this Court determines that the Board abused its discretion in this manner, this Court may find that the Board's 10(k) award cannot support its conclusion that Local 584 violated Section 8(b)(4)(ii)(D)** of the Act and may refuse to enforce the Board's cease and desist order.

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* Section 10(k) provides: Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D), of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within 10 days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

** Section 8(b)(4)(ii)(D) of the Act makes it an unfair labor practice for a union or its agents "to threaten, coerce, or restrain any person engaged in commerce ..., where ... an object thereof is ... forcing or requiring an employer to assign particular work to employees in a particular labor organization or a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order for certification of the Board determining the bargaining representative for employees performing such work...."

1. Under Applicable Standards of Judicial Review The Board's 10(k) Decision Cannot be Sustained

Section 10(e) of the Act, 29 U.S.C. §160(e), provides, in pertinent part, that when a court reviews Board determinations and orders

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.*

In addition, Courts have held that they must accept the Board's work assignment, assuming the evidence supports the facts, unless it can be shown that the Board acted arbitrarily and capriciously in reaching its conclusion. NLRB v. Local 25, IBEW, 396 F.2d (2nd Cir. 1968); also see, NLRB v. International Longshoremen's and Warehousemen's Union, 413 F.2d 30 (9th Cir. 1969); NLRB v. International Longshoremen's and Warehousemen's Union, Local 50, 504 F.2d 1209 (9th Cir. 1974) cert. den., 420 U.S. 973 (1974) (hereinafter "Local 50").

The principles governing judicial review of Board findings have been further defined by the Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). There the Court emphatically

*See, e. g. NLRB v. Local Union No. 3, IBEW, 339 F.2d 145 (2nd Cir. 1964).

stated that the duty of the reviewing Court is not merely to be a "judicial echo" of the Board's conclusions. Rather, the Court must scrutinize the record as a whole to satisfy itself that the Board's order rests on adequate proof. The Court admonished:

> "Reviewing Courts ... are not to abdicate their conventional judicial function. Congress has imposed on [the Courts] the responsibility for assuring that the Board keeps within reasonable bounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole ... The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both". 340 U.S. at 466.

This Circuit has applied the "mood" set by the Supreme Court in Universal Camera when reviewing Board's decisions and has denied enforcement of Board orders when it cannot in good conscience find that the evidence supporting the decision is substantial. Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 452-453 (2nd Cir. 1975) (Friendly, J); NLRB v. Marcus Trucking Co., 286 F.2d 583, 589 (2nd Cir. 1961) (Friendly, J.); NLRB v. Bausch and Lomb, Inc., 526 F.2d 817, 829 (2nd Cir. 1975) (Friendly concurring and dissenting).

The most recent pronouncement on the subject of judicial review of Board 10(k) jurisdictional dispute awards is that of the Ninth Circuit in 1974. In NLRB. v. International

Longshoremen's & Warehousemen's Union, Local 50, supra, 504 F.2d at 1219-1220, the Ninth Circuit scrutinized the Board's decision-making process and denied enforcement to a Board award which had removed work from the union assigned to perform it by the employer. In Local 50, the Employer had originally awarded work to engineers but a work stoppage resulted in the Employer replacing them with the longshoremen. The longshoremen had been doing the work since that time. Both unions claimed the disputed work. The Board took the work from the longshoremen and awarded it to the engineers. The longshoremen refused to comply and the Board sought enforcement of its order. The Board's 10(k) award appeared to rest on the finding that the factors of skill, efficiency, safety and past practice favored the assignment of work to the engineers. The Board rejected the longshoremen's contention that industry practice, the collective bargaining agreement, employer preference and Board precedent favored them. The Court refused to uphold the validity of the Board award, returning the work to the longshoremen based on the Employer's preferred assignment and the terms of the applicable collective bargaining agreement.

The Court refused to "rubber stamp" the award merely because the Board has broad discretion under 10(k). The Court said:

> "We do not think that the Congress or the Supreme Court intended that judicial review should be such a paper tiger".

In NLRB v. Radio and Television Broadcast Engineers Union, Local 1212, 364 U.S. 573 (1961) (hereinafter "CBS"), the Supreme Court had established general parameters within which the Board must decide 10(k) disputes based on its

> " ...long experience in the labor area plus knowledge of the standards generally used by arbitrators, unions, employees, joint boards and others. Experience and common sense will supply the grounds for the performance of the job which Congress assigned the Board". 364 U.S. at 583.

Immediately after CBS, the Board established a list of factors which it said would thenceforth be considered relevant in resolving 10(k) disputes pursuant to the Supreme Court directive in CBS. International Association of Machinists Lodge No. 1743 and J.A. Jones Construction Co., 135 NLRB No. 139 (1962).

In J.A. Jones, the Board said:

> "At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g. the skills and work involved,

> certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrations, joint boards ... the assignment made by the employer, and the efficient operation of the employer's business". 135 NLRB at 1410-1411

The Board, asserting that it needed a sufficient amount of time to gain experience in 10(k) cases, also said it

> "cannot at this time establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. It may be that later, with more experience in concrete cases, a measure of weight can be accorded earlier decisions". 135 NLRB at 1411 (emphasis added)

Since CBS and Jones, and until the Ninth Circuit decision in Local 50 in 1974, the Circuit Courts had paid the greatest deference to the Board's work dispute decisions, enforcing them if the Board said it considered "all relevant factors".*

However, as the Ninth Circuit emphatically stated, the time has come for the Courts to reject the Board litany that because its case by-case decisions are based "on all pertinent factors" (A 17) and since the weight to be accorded the factors is "for the Board not the Courts" (NLRB, brief, p. 10), the

*In the past this Circuit has taken the same approach, e.g. NLRB v. Local Union No. 3, IBEW, supra, 339 F.2d at 147-148; NLRB v. Local Union No. 25, IBEW, supra, 396 F.2d at 593-594.

Court has no choice but to enforce a Board 10(k) award. Nothing in CBS requires this Court to abrogate the judicial responsibilities mandated by Universal Camera because it is reviewing a jurisdictional dispute case. Compare, Lorenz Schneider Co. v. NLRB, supra.

In Local 50, supra, after reviewing this long line of decisions by the Courts in which Board awards have not been disturbed, the Ninth Circuit fired this broadside:

> "Since its Jones decision, the Board has consistently maintained that its policy in making 10(k) work awards is to decide each case on its own merits without announcing any standards or principles which govern the decisions that are made. Such a practice has relieved the Board of the burden of reconciling its decisions either with precedent or with any predetermined set of standards. Such a practice makes life easy for the Board's Trial Examiners or Administrative Law Judges, and for the Board itself. To call the practice a policy, however, is a misnomer. It is a little like making a bouillabaisse or pot au feu. Various ingredients go into the pot and are stirred and simmered, and no matter what they are, or what quantity or quality of each is used, the product is always the same-a bouillabaisse or a pot au feu. Nobody can dispute

> the conclusion; nobody can say, except as a matter of personal taste, whether the result is good or bad.
>
> While the practice may be easy and comfortable for the Board, it makes judicial review virtually impossible, because the decision is totally unprincipled. There is no way for the reviewing court to determine what principles, if any, led to the decision. When the Board lays the stew before the court, its position is essentially this: 'We have put in everything relevant, we have stirred the mixture, and this is the result. Whether you like it or not, you must accept it, because we, not you, are the experts. The Supreme Court told you that in CBS. Who are you to say that we are not?'" 504 F.2d at 1220.

In essence, the Ninth Circuit called a halt to these unprincipled results of the past 14 years:

> "The Courts could be expected to give greater deference to Board decisions during the period in which the Board s decision making process was developing. The time has come, however, for the Board to accord a measure of weight to its past decisions and to establish some rational principles governing the weight that it gives to the various factors it considers in §10(k) hearings. In short, there is need for a good recipe for the stew'. 504 F.2d 1220.

The Court prescribed a 'recipe," noting that the Board's statement that no factor is necessarily more important than any other factor is simply no longer true in light of its myriad decisions after CBS and Jones. In reality the Court found, the Board has developed a body of precedent in which the Board's award coincides "in virtually every case" with employer preference;*

*See commentaries concurring in this view cited by the Court in Local 50, supra, 504 F.2d at 1220, n. 7; also see, "The Role of the NLRB and the Courts in Resolving Union Jurisdictional Disputes", 75 Col. L.Rev. 1470, 1472 (1975) ["From 1961 through 1970 the Board made 349 Section 10(k) awards and confirmed the employers' preference in 95.1 percent of the cases ..."]

and

> "more often than not, other factors deemed relevant by the Board, such as skill, efficiency, safety and employee integration, are factors that the employer has relied on in making the work assignment. Indeed, though the Board purports to rely on its own evaluation of factors such as skill, efficiency and safety, it is often apparent that the employer's evaluation of these factors influences the Board". 504 F.2d at 1221.

Just as the Ninth Circuit decided that the case before it was a "good example of the problems created by standardless decision-making", because the Board had ignored the preference exemplified by the employer's work assignment and had ignored the applicable collective bargaining agreement interpretations as required by prior 10(k) Board decisions, so too is the case at bar.

Applying these principles and considerations to the instant case, it becomes apparent that the Board's work award cannot withstand judicial scrutiny.

2. The Board's Findings of Fact Are Not Supported By Substantial Evidence Nor By 10(k) Precedents.

The Board took the work in dispute away from Local 584 and awarded it to Local 447 based on findings of fact unsupported by the evidence of record. Further, the Board's analysis of the facts was erroneous in several critical

respects. Most important, the Board ignored critical facts manifest in the record as to the employer's past assignment and preference which the Board and the Courts have consistently deemed controlling in myriad other cases. Local 50, supra; also see, e.g., NLRB v. Local Union No. 3, IBEW, supra; NLRB v. Local 1291, ILA, 345 F.2d 4 (3rd Cir. 1965); NLRB v. Local 1291, ILA, 368 F.2d 107 (3rd Cir. 1966); New Orleans Typographical Union No. 17 v. NLRB, 368 F.2d 755 (5th Cir. 1966); NLRB v. International Die Sinkers Conference Milwaukee Lodge No. 140, 402 F.2d 407 (7th Cir. 1968); NLRB v. St. Louis Printing Pressmen and Assistants Union No. 6, 385 F.2d 956 (8th Cir. 1967); NLRB v. Denver Photo-Engravers Union No. 18, 351 F.2d 67 (10th Cir. 1965).

A. Collective Bargaining Agreements.

The Board conceded that the contracts of both Local 447 and Local 384 contained language which could cover the work in dispute. Under prior decisions, if contracts favor neither union, they are neither controlling nor conclusive, NLRB v. Local 1291, ILA, supra, 345 F.2d at 10-11. However, the Board in this case went further and found that the 447 contract "more precisely" covered the work based upon the Board's interpretation of the evidence offered at the hearing as to the events surrounding the assent between Local 447 and Hertz at the time that Hertz first entered

into its agreement with Holland in 1960that Local 584 would perform the work at the Holland facility. The Board said "At the time of the assumption, it is clear that all maintenance, service and repair work was being performed by employees who were represented by Local 447". (A.16-17). Evidence does not support this finding.

It is clear that before the takeover by Hertz in 1960, all maintenance service and repair work at the Maspeth locus in dispute herein* was being performed by employees represented for many years prior to that time by Local 584.(A.86,91; T. 108, 115). It was undisputed that Local 447 had never represented any mechanics at the Maspeth milk account location. Further, the record is clear that after 1960, when Hertz entered into an agreement with Holland to lease vehicles, Hertz authorized a multi-employer association of milk companies to bargain with Local 584 and Hertz has adopted whatever contract they negotiated with the milk unions".** (A.32; T.17).

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*There is no dispute as to Hertz' assignment of Local 447 mechanics at non-milk account locations.

** While no evidence was offered as to the area or industry practice, it should be noted that the milk industry collective bargaining agreement has covered all mechanics working at milk industry locations in the greater New York area for many years. Thus, the testimony of Philip Marsh, relied upon by the Board, with respect to any understanding that this was an "exemption" by Local 447 misses the mark. (NLRB brief, p.3,11). Marsh was not employed by Hertz after June of 1961 and could not testify as to the subsequent history of collective bargaining agreements between Hertz and milk accounts.

The record further discloses, contrary to the Board's assertion (A.17; NLRB, Brief, p.11), that under this milk industry collective bargaining agreement, Local 584 representation of Hertz mechanics at milk account locations is the rule, not the exception. Thus, in addition to Holland, Local 584 represents Hertz mechanics at the Queensborough Farms Milk account in Queens, at the Dairylea Milk account on Long Island, and at one or two other milk accounts in and around the Queens area. (A. 31,32: T.16-17). There was no evidence introduced to show that Local 447 represents Hertz mechanics at any Hertz garage located at a milk plant in the Metropolitan area.

Thus, the Board's finding that Local 447's collective bargaining agreement "more precisely" provides for coverage of the disputed work is simply unsupported by the facts of record.

Further, the Local 584 contract does not limit the maintenance and servicing work done "in and about" a milk distributing branch and garage in the Metropolitan area to milk trucks only. Thus, the Board's finding that "...at the time that Local 447 assented to the employer's assumption of the agreement that Local 584 and Holland were parties to, it was, at least as disclosed by the record, understood that the work would encompass only the maintenance and servicing of

the milk trucks ..." (A.16) is not correct interpretation of the 584 collective bargaining agreement nor of the testimony adduced at the hearing. If the Board's ambiguous statement is intended to extend to any "understanding" by Local 584, it is incorrect. The uncontradicted testimony in the record reveals that there was no discussion at all with Local 584 as to a limitation of the type of trucks to be worked upon by the Hertz employees represented by Local 584. (A.100; T.137). Further, it is uncontradicted that within months after Hertz assumed the Local 584 - Holland agreement, Hertz assigned the employees represented by Local 584 to service and repair non-milk trucks in the garage at the Holland (Maspeth) plant (A.34,87; T.22, 109). Thus, any "understanding" by Hertz or Local 447 that the work would be limited to milk trucks only is undercut by the fact that within six months after the Holland - Hertz lease first was negotiated, Hertz began to assign Local 584 employees to do the work on non-milk trucks at the Holland location without any protest by Local 447.* Local 584 has been doing this work assigned by Hertz continuously for over 14 years.

* The testimony by Roger Touanen that Local 447 had no knowledge of Local 584 working on non-milk trucks until 1972 is incredible. Touanen refused to acknowledge that 447 knew of the assignment although he had been to Maspeth and observed the work being done there (A.81; T.95-96). It is undisputed that Local 447 has had business agents, shop stewards, and "body repairmen" working in the Long Island City district (including Maspeth) at least since the 1960 agreement. (A.50, 68,79-80). Moreover, in 1963-64 Local 584 was servicing and maintaining over 100 non-milk trucks at the Maspeth facility. Local 447's disclaimer was entitled to no weight under these circumstances.

Thus, not only did the Board misinterpret the collective bargaining agreement between Local 584 and Hertz but the Board also assumed an understanding between the parties not borne out by the record.

B. Past Practice.

The Board found that "the employer has ... for at least 16 years ... continuously utilized, to the extent practicable, the services of employees represented by Local 447 with the exception of this one dispute". (A.17). As stated above, the evidence clearly indicates that the practice of Local 584 representation of Hertz mechanics at milk account locations is the rule, not the exception. Having made this bold but erroneous factual assertion, the Board without further discussion summarily found that "past practice weighs in favor of awarding the work to Local 447." In its brief, the Board states that this finding is amply supported by evidence that over 300 Hertz' New York employees working elsewhere have been represented by Local 447 while only the 18 or 20 employees working at the Holland milk location have been represented by Local 584. (Brief, pp.12-13). Thus, the Board chose to ignore the uncontroverted 14 years of past practice at the location in dispute.

In myriad Board decisions where company "past practices" are deemed a factor, these "past practices" are analyzed in the context of the employer's past assignment to the employees doing the work at the location in dispute.* Where the employer has been satisfied that the work done by the employees for many years has been performed efficiently, economically and skillfully, then past practice at that location has been given controlling weight. See e.g., Operating Engineers, Local 66 (Brockway Glass Co.), 218 NLRB No. 90 (1975); Newark Typographical Union (Mid-Atlantic Newspapers), 220 NLRB No. 2 (1975); IATSE, Local 1 (RKO General), 219 NLRB No. 185 (1975); Iron Workers, Local 417 (Spancrete Northeast Inc.),219 NLRB No. 115 (1975); Teamsters, Local 5 (Grinnell Fire Protection System), 220 NLRB No. 116 (1975); Carpenter's Local 1357 (Memphis Publishing Co.), 220 NLRB No. 89 (1975).

This is particularly true, in cases where, as here, the Board asserts that other factors are not decisive. See e.g., Boilermakers Lodge No. 1509, 187 NLRB No. 1 (1970);

*The situation here is comparable to "work preservation" cases in which the efforts of bargaining unit employees to preserve the work traditionally done by its members at a particular job site have been held to be a proper exercise of a union's interests. National Woodworking Mfgrs. Assn. v. NLRB, 386 U.S. 612, rehearing denied, 387 U.S. 926 (1967); also see, National Maritime Union v. Commerce Tankers Corp., 457 F.2d 1127, 1134 (2nd Cir. 1972); Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100,421 U.S. 616,95 S.Ct. 1830, 1837-1840 (1975).

Machinists District Lodge 115 (Myers Drum Co.), 220 NLRB No. 67 (1975); Teamsters Local 5 (Grinnell Fire Protection System), supra.

In view of this pervasive policy, it is "totally unprincipled" for the Board to ignore the precedent and say that the facts in this case require a different result. The facts overwhelmingly indicate that the past practice of the employer has been to assign the work at milk account locations to 584 mechanics. The fact is that substantial Board precedent supports giving significant weight to the employer's preferred assignment, Local 50, supra, 504 F.2d at 1221. Absent some cogent, rational, countervailing considerations, the employer's assignment should be honored.

Despite Board protestations to the contrary, (NLRB, Brief pp. 12-13), there are simply no such considerations present in this case. There is clear and uncontroverted testimony as to the employer's satisfaction with the continous assignment to Local 584 at the Maspeth location and not to Local 447 as the Board's decision obliquely suggests:

(a) Roger Keehn, a Hertz witness, testified that in 1972 he was advised that "...if Hertz Corporation had to choose the work should go to 584" (A.42; T.35).

(b) Keehn further testified that the company did not enjoy having a "mixed" shop with both unions working together. Hertz' main concern in having the Board now decide the dispute (A.50; T.47) was that the Board should not split the work and create a "mixed" shop at the Holland location. (A.105-106; T.144-145).

(c) During the 1973 renegotiations between Hertz and Holland over their lease arrangement, Keehn testified that Hertz had told Holland it "would continue to maintain them [the non-milk trucks] with 584 employees" after these trucks were physically separated from the milk trucks by moving them across the street; Keehn also testified that Hertz was concerned about 447's claim but that this would not affect Hertz' "determination to continue to assign that work to Local 584 employees". (A. 61,62; T.64-65).

(d) The most eloquent testimony of the Employer's assignment preference is that the disputed work has been continuously performed by Hertz by Local 584 employees since 1961. At no time did Hertz assign, or attempt to assign, this work (or any work at other milk plant location garages referred to in the record) to its employees represented by Local 447.

C. Skills and Efficiency.

The Board's analysis discounted the skill and efficiency of Local 584 despite Hertz' satisfaction with its assignment. This finding is unsupported by the evidence and contrary to Board 10(k) precedent. To buttress its finding that skill and efficiency favored neither union, the Board ambiguously asserted: "the record further indicates that (1) the Employer's employees possess the necessary skills to perform the disputed work and (2) the Employer is satisfied with their performance". (A.17)

It is impossible to believe that this obtuse statement is meant to support a conclusion that skill and efficiency favor neither union. If anything, the Board seems to suggest that the Employer assigned the disputed work to Local 447 and is satisfied with their performance. It is incredible for the Board to make this assertion in light of the unequivocal evidence which shows that Hertz assigned the work to Local 584 and has been satisfied with Local 584's performance since 1961.

The Board's refusal to acknowledge these 14 years of continuous satisfactory service and give it controlling weight is probably the most glaring error in its decision Local 50, supra, 504 F.2d at 1221. Moreover, the Board

offers no compelling reasons why these factors do not favor Local 584 when these exact same factors have consistently been held to favor the union awarded the work by the employer when coupled with evidence of skills, efficiency and economy in continuing that assignment. See e.g., Longshoremen (ILWU), Local 54 (Pacific Maritime Association), 221 NLRB No. 28 (1975); Teamsters Local 5 (Grinnell Fire Protection Systems Co.) 221 NLRB No. 192 (1975); Iron Workers, Local 417 (Spancrete Northeast Inc.), supra.

While both unions may possess the requisite skills (making skills an irrelevant factor under prior applicable Board analysis), it is not true that evidence indicates that efficiency favors the use of neither union.

There is ample evidence to support a contrary finding, i.e., that the employer's assignment to 584 rather than 447 has been and continues to be predicated on efficiency and economy.

a) the work performed in the garage located within the milk plant, as well as the lot across the street, is under the common supervision of the Maspeth milk plant garage supervisor (A.36, T.24-25).

b) the same mechanics, using one set of tools, are utilized to perform work on milk and non-milk trucks interchangeably (A.36,88: T.25,111) at the main garage and the

annex across the street (A.87-89; T.109-112; note that T.111 was corrected at A.93; T.125-126).

c) the work done on the 35 non-milk trucks now serviced at the Maspeth facility is "minor" (A.35-36; T. 23-24) and intermittent as compared to the "major" repairs done on the 160-plus milk trucks (A.34; T.21).

Since this evidence substantiates the inference that it is more economical and efficient to assign one crew of equally skilled 584 mechanics at the Maspeth location to do the intermittent non-milk work under one supervisor than to import 447 men from other locations in the Hertz system to do it, Teamsters Local 170 (Associated General Contractors) 216 NLRB No. 46 (1975), it is readily apparent that the Board has again ignored prior decisions according weight to the employer's assignment where the Employer's evaluation of efficiency and economy favor continuing that assignment. Local 50, supra, 504 F.2d at 1221; NLRB v. Local 991, ILA, 332 F.2d 66 (5th Cir. 1966).

In effect, the Board's award bifurcating the work at the Maspeth facility has turned the employer's statement concerning its desire to avoid a mixed shop in the future at all cost into the very situation it had sought to avert in the past. When the Board fails to give significant weight to these factors concerning the employer's "critical stake in the outcome" it also fails in its responsibility to promote

industrial peace and stability.

In sum, when subjected to analysis, it is clear that the Board's findings are not supported by the evidence nor by any consistent application of 10(k) precedent to the relevant factors present in the record. Since the Board's failure to find that past practice and employer preference favor Local 584 is a revolutionary departure from the pattern of Board decisions emphasizing the past practice regarding the work in dispute and the employer's assignment, its conclusion is unprincipled, arbitrary and capricious. Accordingly, it is not entitled to enforcement. Local 50, supra; Universal Camera, supra.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court should deny enforcement of the Board's order and should enter a judgment vacating or setting aside the order thereby preserving the jurisdiction of Local 584 over the work in dispute.

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March, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

v. :

LOCAL UNION NO. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, :

Respondent. :

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the brief for Respondent Local Union No. 584, IBT, has been served upon the Petitioner National Labor Relations Board, by mail this day to the attention of Elliot Moore, Deputy Associate General Counsel, Washington, D.C. 20570.

DATED: March 26, 1976

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